

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>WILLIAM E. LAWTON</b>	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 228,799 & 228,800
<b>RICHMAN-HELSTROM TRUCKING, INC.</b>	)	
Respondent	)	
AND	)	
	)	
<b>KS TRUCKING RISK MGMT GROUP INC. TRUST</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent appeals from the preliminary hearing Order of Administrative Law Judge Floyd V. Palmer dated April 10,1998, wherein the Administrative Law Judge granted claimant medical treatment finding claimant's accidental injury did arise out of and in the course of his employment and that notice was given within 10 days.

**ISSUES**

1. Did claimant suffer accidental injury arising out of and in the course of his employment on the date alleged?
2. Was notice provided pursuant to K.S.A. 44-520?
3. Should respondent's appeal be dismissed for failure to timely file its brief?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based upon the evidence presented, and for the purpose of preliminary hearing, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant alleges accidental injury arising out of and in the course of his employment with respondent on August 29, 1997, and October 23, 1997. Claimant suffered accidental injury on August 29, 1997, when his right hand was smashed between an I-beam and a cinder block. An accident report was prepared by respondent and claimant was provided medical treatment for the hand.

Claimant alleged an injury to his right shoulder on October 23, 1997, when he was moving cribbing which have been described as 6-inch by 8-inch by 3- to 4-foot pieces of wood used to shore up houses when they were being moved. Claimant described the cribbing as weighing between 40 and 80 pounds, with respondent's representatives describing the wood as weighing approximately 40 pounds. Claimant testified that on the date of accident he was moving some of the cribbing when he felt a pop in his right shoulder. Claimant alleges he advised respondent's owner, Delores (Dee) Richman, his foreman, Anthony Dean (Deano) Duncan, and another foreman, Clarence Dale (Dale) Fortenberry, of the accident. Respondent's owner and both foremen denied being advised by claimant of an accidental injury occurring on October 23, 1997, and denied that claimant ever exhibited any symptoms or voiced any complaints regarding his right shoulder while employed with respondent. Claimant's employment with respondent ended on December 14, 1997, when he was let go due to attendance problems.

Claimant sought no medical treatment for the shoulder until February 23, 1998. Claimant did seek medical treatment for his right hand on December 14, 1997, at Ransom Memorial Hospital but made no mention of the shoulder at that time. Claimant again sought medical treatment with Dr. Lori L. Stonehocker, D.O., on February 11, 1998, for the right hand injury and also for an unrelated back injury that claimant suffered in Grand Junction, Colorado, in 1995 while working for Goodyear. Again, claimant did not mention his shoulder. The first medical record of any complaints by claimant regarding his right shoulder is dated February 23, 1998, when he was again examined by Dr. Stonehocker.

When asked why he did not seek medical treatment for the shoulder, claimant first stated that he could not get off work. However, claimant missed an average of one day per week while employed with respondent because he had to take his wife and his daughter to the doctor contradicting his alleged inability to get off work for his shoulder. It is significant that, while he was taking his daughter to Dr. Stonehocker, claimant at no time mentioned his shoulder. Claimant last worked for respondent on December 14, 1997, but did not seek medical treatment until February 23, 1998. During this period of time claimant was unemployed and was receiving SRS assistance.

There is no indication in any of the records, medical or otherwise, that claimant advised anyone of his shoulder problems or was in any way disabled from performing his regular job duties. Mr. Duncan and Mr. Fortenberry both testified that they worked with claimant on an almost daily basis and were never advised of any shoulder problems. They also testified claimant failed to exhibit any limitations to the right shoulder during his employment.

In workers compensation litigation, it is claimant's burden to prove his entitlement to benefits by proving the elements upon which his claim exists by a preponderance of the credible evidence. See K.S.A. 1997 Supp. 44-501 and K.S.A. 1997 Supp. 44-508(g). In this instance, the evidence in support of claimant's position consists of claimant's testimony. There are no medical records, personnel records, or testimony from any other source which verify that claimant suffered an accidental injury to his right shoulder on October 23, 1997.

The testimony from the three representatives of respondent indicate claimant not only did not suffer accidental injury on the date alleged but exhibited no limitations to his right shoulder at any time through December 14, 1997, his last day worked. In addition, claimant had multiple opportunities while at Dr. Stonehocker's office to discuss his right shoulder problems. However, claimant failed to mention any right shoulder problems until February 23, 1998, more than four months after the alleged date of accident. The Appeals Board finds, based upon a review of the evidence and testimony, that claimant has failed to prove accidental injury arising out of and in the course of his employment with respondent.

K.S.A. 44-520 requires that notice of an accidental injury be given to respondent within 10 days after the date of accident. The 10-day notice shall not bar proceedings for compensation if it is shown the claimant's failure to notify was due to just cause. However, just cause limitation extends only to 75 days beyond the date of accident. In this instance, the first verifiable notice is February 23, 1998, when claimant was in Dr. Stonehocker's office. As this is beyond both 10 and 75 days from the date of accident, just cause would not be an issue in this case. In addition, there is no support other than claimant's own testimony to verify that claimant advised respondent of his shoulder injury on October 23, 1997. The medical record of Dr. Stonehocker dated February 11, 1998, and the medical record from Ransom Memorial Hospital dated December 14, 1997, do not mention the right shoulder. Claimant's only concerns on those dates were his right hand and a back injury which occurred at a previous employment. In weighing the totality of the evidence, the Appeals Board finds that claimant failed to provide notice to respondent of an accidental injury on October 23, 1997, pursuant to K.S.A. 44-520, and for the above reasons, benefits should be denied.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Floyd V. Palmer dated April 10, 1998, should be, and is hereby, reversed with regard to Docket No. 228,800 and claimant is denied benefits for an accidental injury alleged on October 23, 1997, to his right shoulder. This order in no way effects claimant's entitlement to medical benefits for the injury occurring on August 29, 1997, to his right hand.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June 1998.

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BOARD MEMBER

c: Terry E. Beck, Topeka, KS  
Ronald J. Laskowski, Topeka, KS  
Administrative Law Judge, Topeka, KS  
Philip S. Harness, Director